Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

T. MICHAEL MACARIO, III,
Petitioner

v.

PRATT & WHITNEY CANADA, INC., et al.,
Respondents

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

ARTHUR ALAN WOLK*
CATHERINE B. SLAVIN
WOLK & GENTER
1710-12 Locust Street
Philadelphia, PA 19103
(215) 545-4220

Counsel for Petitioner

*Counsel of Record

PACKARD PRESS / LEGAL DIVISION, 1617 JFK BOULEVARD, PHILA., PA 19103 (215) 563-9000

QUESTIONS PRESENTED FOR REVIEW

1. Whether, contrary to the decisions of this Court, a court in granting summary judgment may make factual determinations contrary to the uncontradicted affidavits and concrete evidence proffered by the non-moving party?

2. Whether action by a federal agency serves to relieve a contracting party from state law liability for breach of contract where that federal agency's action does not prohibit contract compliance?

3. Whether a court may enter summary judgment and conclude as a matter of law that the *Noerr-Pennington* doctrine applies to a defendant's conduct in a non-antitrust case where the non-moving party has presented uncontradicted affidavits and other concrete evidence showing that the application to the federal agency was a sham?

PARTIES TO THE PROCEEDING BELOW

The following persons and entities were parties before the United States Court of Appeals for the Third Circuit: T. Michael Macario, III, Pratt & Whitney Canada, Inc., and Beech Aircraft Corporation.

T. Michael Macario, III is an individual, a citizen and resident of the Commonwealth of Pennsylvania, and is the administrator of the estate of Matthew Macario, deceased, who was a Pennsylvania resident at the time of his death. Pratt & Whitney Canada, Inc. is a Canadian corporation, and is a subsidiary of United Technologies Corporation. Beech Aircraft Corporation is a Delaware corporation with its principal place of business in Kansas, and is a subsidiary of Raytheon Company.

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OPINIONS BELOW

The final order of the United States Court of Appeals for the Third Circuit, on petition for rehearing (per Robert E. Cowan, J.), appears in the appendix to this petition (App. A-1), as well as the memorandum opinion of the court of appeals (per Robert E. Cowan, J.) (App. A-2 to A-4). Also appearing in the appendix is the memorandum opinion of the district court (James McGirr Kelly, J.) granting summary judgment in favor of respondents and against petitioner. (App. A-5 to A-19). The decision of the court of appeals affirming the grant of summary judgment is reported at 17 F.3d 1430 (3d Cir. 1994).

JURISDICTION

On February 25, 1994, the United States Court of Appeals for the Third Circuit denied petitioner's petition for rehearing of the judgment entered on January 26, 1994. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

The following appear in the appendix: 49 U.S.C. App. § 1305(a) and 49 U.S.C. § 1506 of the Federal Aviation Act, as amended, and Rules 56(c) and 56(e) of the Federal Rules of Civil Procedure as they existed at the time summary judgment was entered.

STATEMENT OF THE CASE

On February 1, 1985, Matthew Macario died when the aircraft he was operating lost engine power and crashed on approach to the Millville Airport in Millville, New Jersey. The accident airplane was a King Air A100 aircraft manufactured by Beech Aircraft Corporation ("Beech"), equipped with two PT6A engines manufactured by Pratt & Whitney Canada, Inc. ("PWC"). Wrongful death and survival actions were filed in the United States District Court for the Eastern District of Pennsylvania (hereinafter *"Macario I"*). Macario proceeded to trial against PWC only in November of 1989.

At trial, Macario proved that a defect in the PT6A powerplant allowed airborne contamination to cause the automatic fuel control of the engine to fail, resulting in a loss of engine power which ultimately caused the fatal crash. The jury heard testimony that the contamination problem could be eliminated by installation of a filter on the P3 air line to the fuel control unit, that in 1981 PWC had issued Service Bulletin 1330 making installation of the P3 filter optional,[1] and that the P3 filter was

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1. Service bulletins are issued by manufacturers to alert owners and operators to mandated or optional service requirements. Service bulletins and any revisions thereto are generally approved by "DAR", which means that someone at PWC stands in the shoes of the Federal Aviation Administration ("FAA") and certifies or approves service bulletins on its behalf. Such approval is a sign-off by PWC Product Support requiring no administrative approval by the FAA to be effective.

required by manufacturers other than Beech on their aircraft equipped with the very same engines to avoid a loss of power.

At the same time *Macario I* was pending, a class action complaint was filed by Sunbird Air Services, Inc. in the United States District Court for the District of Kansas against PWC, Beech, Bendix Avelex, and others asserting various statutory and common law claims for damages on behalf of the owners and operators of King Air airplanes which were not equipped with P3 filters (hereinafter *"Sunbird"*), a case in which Beech and PWC had substantial financial exposure.

During its deliberations, the Macario I jury posed written questions to the trial court concerning jury interrogatory number 4, dealing with punitive damages, telegraphing to all counsel that compensatory damages would be awarded and that punitive damages were under consideration. Only then, faced with the realization that a liability verdict was going to be returned against it, did PWC's counsel approach Macario's counsel about settling before verdict. As part of the settlement, and in exchange for no verdict being rendered by the jury, PWC agreed to reissue Service Bulletin 1330 marked "priority" and to be issued "as soon as practical," as well as to advise aircraft owners and operators that such filters could avoid contamination that would result in loss of engine power. The terms of the settlement were hammered out and approved in chambers with the simultaneous concurrence of the trial judge, PWC Engineering, and all counsel.

PWC did not reissue Service Bulletin 1330, however; thus, Macario commenced this action on June 8, 1990 seeking damages from PWC for breach of contract and from Beech for tortious interference with contract. Macario alleged that PWC agreed to reissue Service Bulletin 1330 solely to avoid the preclusive effect such a verdict would have on the *Sunbird* class action, but had no intention of ever reissuing it as agreed, and that it acted in concert with Beech, a multimillion dollar customer, to evade reissuing Service Bulletin 1330. A second amended complaint was filed with leave of court on March 5, 1991, alleging, *inter alia*, breach of contract, tortious interference with contract, misappropriation, conspiracy, concerted action, unjust enrichment, and fraud in the inducement.

On March 1, 1994, at the request and connivance of Beech and PWC, a Notice of Proposed Rulemaking ("NPRM") was published in the Federal Register, in which the FAA proposed to amend 14 C.F.R. pt. 39 "to adopt a new airworthiness directive. . .which would require the removal of the P3 filter assembly", 56 Fed. Reg. 8733 (Mar. 1, 1991), but only from those aircraft built by Beech, even though aircraft manufactured by other manufacturers (but not defendants in the class action) and equipped with the very same engines were excluded. The NPRM was prompted by certain flight tests conducted by Beech as a result of the *Macario I* settlement, and affected approximately 4,330 aircraft and engines which had been subject to Service Bulletin 1330. Only the Macario aircraft, the model A100, was not affected.

PWC moved for a stay under the doctrine of primary jurisdiction on March 11, 1991, on the ground that the airworthiness directive which the FAA proposed to issue (1) would disallow the reissuance of Service Bulletin 1330 and (2) would be dispositive of all of the issues in this case. Shortly thereafter, on April 21, 1991, PWC issued Alert Service Bulletin A-1330, marked "priority", which required the installation of the P3 filter on the A100 model only.

On May 31, 1991, PWC and Beech filed motions for summary judgment. PWC's motion alleged contractual and legal impracticality, mutual mistake of fact, and lack of damages, among other defenses, and argued that PWC had discharged its obligations under the settlement contract by issuing Service Bulletin A-1330. Beech, on the other hand, contended that Macario could not collaterally attack the FAA's decision, that Macario's claims were barred by the doctrine of federal preemption, and that its conduct was protected under the first amendment, among other defenses.

On June 11, 1991, before Macario could file a response to the summary judgment motions, the trial court stayed the proceedings "until the Federal Aviation Administration decides the issue of whether to enact the proposed rule at 56 Fed. Reg. 8733 (1991) (to be codified at 14 C.F.R. pt. 39)." Thirteen

months later, 14 C.F.R. § 39.13 was amended to include the new airworthiness directive, AD 92-15-11. 57 Fed. Reg. 31654 (July 17, 1992).

When finally issued, AD 92-15-11 did not say that P3 filters were dangerous or detrimental to aircraft operations. Rather than a blanket prohibition against installation of the P3 filters, the FAA determined, based on data supplied solely by Beech (at engine fuel control settings that PWC said made the engine being used uncertifiable), that filters could be detrimental in the balked landing configuration only. 57 Fed. Reg. 31654. Most importantly of all, the AD provided:

> [R]elative to the original intent of the PWC filter option, the FAA has coordinated with PWC to define a test program that may identify an engine configuration allowing P3 filters to remain as an option. *This AD will be amended to include a P3 filter installation option if it is developed.*

57 Fed. Reg. 31657 (emphasis supplied).

The stay was lifted on August 26, 1992. Macario submitted deposition testimony and expert affidavits in opposition to the motions, and pointed out that PWC's partial compliance came only after Macario incurred considerable litigation expense, and then because it affected only a few hundred airplanes.

After entertaining oral argument, by memorandum and order entered on February 12, 1993, the district court granted the motions for summary judgment in all respects. The court determined the question before it with respect to the breach of contract claim to be "whether or not the terms of the settlement agreement can prevail over the FAA," and answered that question by concluding that PWC had reissued Service Bulletin A-1330 in conformity with the terms of the airworthiness directive, and thus complied to the best of its ability and its duty as far as issuing the service bulletin was discharged. (App. A-8, A-9). The court also concluded that Beech's actions fell within the *Noerr-Pennington* doctrine and it was therefore immune from tort liability. (App. A-12).

Macario took a timely appeal to the United States Court of Appeals for the Third Circuit. After stating that the facts of the case were adequately set forth in the district court's opinion

dated February 11, 1993, the United States Court of Appeals for the Third Circuit concluded that the district court properly granted summary judgment. (App. A-3). The court of appeals concluded that, to the extent possible, Pratt conformed with the settlement agreement and did not breach its contractual obligations, and likewise upheld the grant of summary judgment on the misappropriation count, reasoning that because the FAA's action prevented PWC from issuing the service bulletin in strict conformance with the settlement agreement, Macario had no property interest in the service bulletin. (App. A-3). The court concluded as well that the tortious interference with contract, civil conspiracy, and concerted action counts were barred on first amendment grounds. (App. A-3).

REASONS FOR GRANTING THE WRIT

The failure by the court of appeals to afford plenary review, the failure to afford *de novo* analysis of the applicable law, the neglect of uncontroverted mistakes of fact by the district court, and the disregard of reported decisions by the Court on summary judgment and federal preemption, all compounded an injustice by allowing a summary judgment that should never have been entered to be affirmed. This result is not only inherently unfair, but constitutes appellate deference forbidden by the decisions of the Court.

The Court's guidance is required because the decision by the court of appeals sends a terrible message to litigants. Now, a settlement reached before a federal judge to avoid a punitive damage verdict becomes a sham, just another legal tactic to avoid decision by a jury. This precedent sends an unsavory message to litigants and their lawyers, and brings discredit to our judicial institutions, in particular the federal judiciary. If this decision is allowed to stand, no lawyer should again settle a case with the supervision of a federal judge and expect compliance by the settling party or seek enforcement by the district court in the absence of such compliance.

The Court's decisions in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) sought to work a delicate balance between the right to a

jury trial and the right to be spared the burden and expense of a jury trial where there is no factual basis therefor. These decisions were not intended as a means to allow wholesale docket-clearing or to allow difficult cases to be swept under the procedural rug of summary disposition.

The Court specifically cautioned in *Anderson v. Liberty Lobby* that the court's function on summary judgment is not "to weigh the evidence and determine whether there is a genuine issue for trial." 477 U.S. at 249. By ignoring the "significantly probative" evidence proffered by Macario, *id.*, the trial court and the court of appeals after it acted as fact-finder and ran afoul of their duties as defined by the Court in *Anderson*.

By interpreting the airworthiness directive as preemptive and by failing to read it in toto to encompass the language allowing P3 filter installation, the decision of the court of appeals is at odds with the decisions of this Court on federal preemption, most recently *Cipollone v. Liggett Group*, 112 S. Ct. 2608 (1992) and the decisions of the Tenth and Eleventh Circuits in *Cleveland v. Piper Aircraft Corp.*, 985 F. 2d 1438 (10th Cir.), *cert. denied*, 114 S. Ct. 291 (1993) and *Public Health Trust v. Lake Aircraft, Inc.*, 992 F.2d 291 (11th Cir. 1993). Consideration by the Court is required, then, to ensure the uniformity and consistency of review on the preemptive effects of the federal aviation regulations on state common law claims.

Lastly, this case presents a question of first impression whether the *Noerr-Pennington* doctrine applies outside the antitrust context, where the litigants generally are competitors with similar means, comparable to protect their business interests, and equal access to the administrative and legislative processes. If such protection does apply, the Court should grant certiorari to delineate the limits of that protection and the showing necessary to demonstrate sham-petitioning outside the antitrust context.

De novo review is meaningless if no review takes place. In its decision, the Third Circuit, may truly be said,

> has so far departed from the accepted and usual course of judicial review as to call for an exercise of the court's power of supervision.

Sup. Ct. R. 10.1(a).

I. THE WEIGHING OF EVIDENCE AND THE LACK OF INDEPENDENT, NONDEFERENTIAL REVIEW IS INCONSISTENT WITH THE APPLICABLE STANDARD OF REVIEW AND IN CONFLICT WITH APPLICABLE DECISIONS OF THE COURT.

In affirming the district court's grant of summary judgment, the court of appeals stated: "The facts of this case are adequately set forth in the district court's opinion dated February 11, 1993." (App. A-2 to A-3). The facts of the case as set forth in the district court's opinion are neither adequate nor accurate.

For instance, the district court stated in its opinion that "Pratt & Whitney and Beech conducted flight tests and reported their findings to the FAA." (App. A-6). There was no record evidence that Pratt conducted flight tests; indeed, this was perhaps the only fact that was not in dispute. This misapprehension of a most material fact by the district court goes to the very heart of this controversy. Macario's case rested on proof, through his experts, that there were a number of things Pratt could have done, *including flight tests*, to satisfy the FAA, to allow the AD to be amended to include the filter (or not issued at all had PWC taken such steps in the first instance), and to enable it to reissue Service Bulletin 1330 to discharge its obligations under the settlement agreement. Had the court of appeals discharged its duty of responsible appellate review, it would not have, nor could it have, wholeheartedly embraced the district court's erroneous factual findings and misapplication of the law.

Summary judgment orders are subject to *de novo* or plenary review.[2] This standard is most frequently articulated to

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2. The courts of appeals are in agreement on this standard. *See, e.g., Stone Forest Industries, Inc. v. United States*, 973 F.2d 1548 1550 (Fed. Cir. 1992) (plenary review); *A-L Associates, Inc. v. Jordan*, 963 F.2d 1529, 1530 (D.C. Cir. 1992) (*de novo* review); *Wells v. United States Steel Carnegie Pension Fund, Inc.*, 950 F.2d 1244, 1247 (6th Cir. 1992) (*de novo* review); *Taggart v. Time, Inc.* 924 F.2d 43, 45-46 (2d. Cir. 1991) (*de novo* review); *Lavespere v. Niagara Machine & Tool Works, Inc.*, 910 F.2d 167, 177 & n.34 (5th Cir. 1990) (plenary review); *Griggs-Ryan v. Smith*, 904 F.2d 112, 115 (1st Cir. 1990) (plenary review); *United Bank & Trust Co. v. Kansas Bankers Surety Co.*, 901 F.2d 1520, 1522 (10th Cir. 1990) (*de novo* review); *In re*

state that the reviewing court applies the same standard that the district court used or should have used initially. *See, e.g., Quinn v. Stone,* 978 F. 2d 126, 131 (3d Cir. 1992). The problem in this case is that no standard was applied.

What the trial court cannot do on summary judgment is decide issues of fact. *Anderson,* 477 U.S. at 244, nor can the reviewing court engage in independent de novo review without ascertaining that the district court did not do so. *Abourezk v. New York Airlines, Inc.* 895 F.2d 1456, 1458 (D.C. Cir. 1990). ("[F]irst, we must be sure that the district court has not overlooked or impermissibly resolved any disputed material facts, and second we must ensure that trial judge correctly applied the law to these undisputed facts)". But that is exactly what the trial court did here, with the stamp of approval of the court of appeals.

Certiorari should thus be granted to provide further clarification to the lower courts on the standard that is to be applied by the trial court in the first instance and by the appellate courts in their de novo survey of the record. In *Anderson v. Liberty Lobby, Inc.* 477 U.S. 259 (1986), the Court held that "whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case." *Id.* at 255. The questions left open by Anderson were "how these evidentiary standards are to be considered, or what a trial judge is actually supposed to do in ruling on a motion for summary judgment." *Id.* at 258 (Brennan, J., dissenting) (emphasis in original). *See also id.* at 269 (Rehnquist, J., dissenting) ("The Court fail[s] to apply its newly announced rule to the facts of this case").

Review is also necessary for further clarification as to how the non-moving party defeats summary judgment and satisfies the "evidentiary standards that apply to the case" and the burden-shifting which occurs once he does so. Rule 56(e) requires a nonmoving party to go beyond the pleadings and, by his own affidavits or other Rule 56 evidentiary materials, designate specific facts showing that there is a genuine issue for

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Franklin, 891 F.2d 1555, 1560 (11th Cir. 1990); *McMillian v. Svetanoff,* 878 F.2d 186, 188 (7th Cir. 1989) (*de novo* review).

trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). This showing cannot be "merely colorable" or "not significantly probative." *Id.* at 324.

Macario submitted affidavits from the former Chief of the Propulsion Section of the FAA's Aircraft Engineering Division, Central Region, the former Chief of Engineering Flight Tests of the FAA Wichita, a former test pilot for Piper Aircraft Corporation, and a former PWC employee. The expert affidavits offered by Macario looked to the plain language of the AD that it *can be amended* to include P3 filters. Macario's experts stated in their affidavits, and would likewise have testified at trial, that there are a number of things PWC could have done to obtain full FAA approval for the revised service bulletin, such as performing flight tests in accordance with the already existing Beech minimum specifications by specifying a set of fuel control, operating, and maintenance criteria which would ensure adequate acceleration of the engine and the AD would then have been inapplicable to the aircraft or engines to which it is now directed.

Macario made this showing by submitting affidavits from his experts, gentlemen with decades of experience in the FAA and the industry.[3] The affidavits went unanswered, with neither defendant offering a single affidavit from their own engineers, product support people, or test pilots to dispute Macario's

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3. In addition to these affidavits, Macario submitted a host of other evidence, including the deposition testimony of both of PWC's trial attorneys and a claims attorney employed by PWC's insurer showing that PWC had done legal research months before the trial on the preclusive effect of an adverse verdict in *Macario I* on the *Sunbird* litigation, that its lawyers were doing the same research the day Macario I settled, that the motivating factor behind the settlement was avoidance of a jury verdict, and other evidence tending to show state of mind. Macario also provided the district court with a document trail consisting of Beech and PWC's own business records, demonstrating that Beech went into action immediately after the settlement to make certain that the service bulletin never issued, that Beech never complained in the eight years prior to the settlement that the filters raised "safety of flight" concerns, that Beech flight tests were deliberately flawed, and that PWC issued other service bulletins requiring the filter to be installed without prior notice to the FAA.

expert affidavits, but electing instead to rely solely on the arguments of counsel in their briefs against these affidavits.

Though the Court has held that the moving party need not support a motion for summary judgment with affidavits, 477 U.S. at 323-24, once the non-moving party comes forward with evidence to support his claim, the moving party must make some affirmative showing, through affidavits or otherwise, to dence of a genuine issue of material fact. *See id.* at 328 (White, J., concurring) (had non-moving party named a witness to support her claim, summary judgment should not be granted without showing by moving party that witness' possible testimony raises no genuine issue of material fact). No such showing was made here.

By failing to look at the district court's actions with a critical and nondeferential eye, the court of appeals abdicated its duty of responsible appellate review. "Where de novo review is compelled, no form of appellate deference is acceptable". *Salve Regina College v. Russell,* 111 S. Ct. 1217, 1224 (1991). This Court should review the deference afforded the summary judgment determinations by the court of appeals.

II. THE DECISION OF THE COURT OF APPEALS IS CONTRARY TO THIS COURT'S PREEMPTION DECISIONS AND IS AT ODDS WITH THE DECISIONS OF OTHER CIRCUITS REGARDING THE INTERRELATIONSHIP BETWEEN STATE TORT LAW REMEDIES AND FEDERAL REGULATION OF AVIATION SAFETY.

The district court framed the issue before it as follows: "[W]hether or not the terms of the settlement agreement can prevail over the FAA." (App. A-8). The court of appeals affirmed because "the district court correctly determined that the FAA issued an airworthiness directive on July 16, 1992, which made it impracticable for Pratt & Whitney to conform with the precise terms of the settlement agreement" and "[s]ince the FAA's action prevented Pratt from issuing the service bulletin in strict conformance with the settlement agreement." (App. A-3). Explicit in the district court's opinion, and implicit in the court

of appeals' opinion, is the finding that the FAA regulation and Macario's state law claims are mutually exclusive and that the tort claims somehow were preempted once the airworthiness directive issued. To reach this interpretation, the express language of the regulation to the contrary was ignored, as was authority cited by Macario that another court interpreting this very regulation – the *Sunbird* court – held the regulation did not preempt state law damage claims. *Sunbird Air Services, Inc. v. Beech Aircraft Corp.*, 789 F. Supp. 360, 362 (D. Kan. 1992).

This interpretation of the regulation also runs afoul of the Court's preemption decisions and the decisions of other circuits, in particular, the Tenth and Eleventh Circuits, on the relationship between the federal aviation regulations and state law tort claims. The opinions of the Court teach that federal preemption may be triggered in one of three ways: (1) an express preemption clause in a federal statute; (2) implied preemption by virtue of a "clear and manifest" intent to occupy a given field to the exclusion of state common law, otherwise known as "field preemption"; and (3) implied preemption where compliance with both federal and state regulations is a physical impossibility or where state law stands as an obstacle to accomplishing and executing the full purposes and objectives of Congress, also known as "conflict preemption". *See generally Gade v. National Solid Wastes Management Association*, 112 S. Ct. 2374, 2383 (1992). Macario's state law claims are neither expressly nor implicitly preempted by the promulgation of the AD.

The first prong – express preemption – is not applicable. The Federal Aviation Act of 1958, as amended, 49 U.S.C. App. § 1301 *et seq.*, governs two broad areas of congressional concern in aviation: (1) rates and routes of air carriers and (2) air safety. *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438, 1444 (10th Cir.), *cert. denied*, 114 S. Ct. 291 (1993). The Act contains an express preemption provision "relating to rates, routes, or services of. . .air carrier[s] . . . ." 49 U.S.C. App. § 1305(a). There is no such express preemption provision for air safety. Consequently, the area of air safety is not preempted because it is "beyond [the] reach of the express preemption provision." *Cipollone v. Liggett Group*, 112 S. Ct. 2608, 2618 (1992); *Cleveland, supra*, 985 F.2d at 1444 (footnote omitted).

The Act also contains a "general remedies savings clause", *Morales v. Trans World Airlines, Inc.* 112 S. Ct. 2031, 2037 (1992), which specifically provides that "[n]othing contained in [the Federal Aviation Program] shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Chapter *are in addition to such remedies.*" 49 U.S.C. App. § 1506 (emphasis added). Section 1506 shows that Congress did *not* intend to occupy the field of airplane safety to the exclusion of state common law. *In Re Air Crash Disaster at John F. Kennedy International Airport,* 635 F. 2d 67, 74-75 (2d Cir. 1980). So, too, in this case, the absence of an express preemption provision, coupled with the savings clause, means that Congress did *not* preempt state common law in the area of air safety. *Public Health Trust v. Lake Aircraft, Inc.,* 992 F. 2d 291, 294-95 & n.3 (11th Cir. 1993); *Cleveland, supra,* 985 F.2d at 1443.

Where Congress has not enacted an explicit preemption clause, state law may still be displaced if an intent to preempt is "implicitly contained in [the federal statute's] structure and purpose." *Jones v. Rath Packing Co.,* 430 U.S. 519, 525 (1977). This question turns on congressional intent. *Schneidewind v. ANR Pipeline Co.,* 485 U.S. 293, 299 (1988). Nevertheless:

> [t]he mere fact that Congress has enacted detailed legislation addressing a matter of dominant federal interest does not indicate an intent to displace state law entirely. *English v. General Elec. Co.,* 496 U.S. 72, 87, 110 S. Ct. 2270, 2279, 110 L.Ed.2d 65 (1990); *Hillsborough County v. Automated Medical Lab, Inc.,* 471 U.S. 707, 716-20, 105 S. Ct. 2371, 2376-79, 85 L.Ed.2d 714 (1985). Congress may reserve for the federal government the exclusive right to regulate safety in a given field, yet permit the states to maintain tort remedies covering much the same territory. *Silkwood v. Kerr-McGee Corp.,* 464 U.S. 238, 253, 104 S. Ct. 615, 624, 78 L.Ed.2d 443 (1984). This is so even though an award of damages may have the same effect as direct state regulation. *See San Diego Bldg. Trades Council v. Garmon,* 359 U.S. 236, 247, 79 S. Ct. 73, 78, 3 L.Ed.2d 775 (1959).

Cleveland, supra, 985 F.2d at 1441.

Indeed, "where Congress has with words pre-empted some kinds of state lawmaking, courts are cautious about relying on implied preemption theories to limit state authority further." *Public Health Trust v. Lake Aircraft, Inc., supra,* 992 F.2d at 294. A majority of this Court in Cipollone concluded that the doctrine of implied preemption is generally inapplicable where the statute contains an express preemption provision. *Cipollone v. Liggett Group, supra,* 112 S. Ct. at 2618 (plurality opinion); *id.* at 2625 (Blackmun, J., concurring); *id.* at 2633 (Scalia, J., dissenting in part).

Under the authority of *Cipollone*, field preemption is not applicable because the Act contains a preemption provision and the regulations promulgated thereunder do not evince congressional intent to displace state law tort remedies. The Tenth Circuit in Cleveland concluded that Congress did not indicate a "clear and manifest" intent to occupy the field of airplane safety to the exclusion of state law, but by virtue of the savings clause, that Congress has intended to allow state common law to stand side by side with the system of federal regulations it has developed. 985 F.2d at 1444.

The third and final way federal preemption may be triggered is if a party's state law claims create an irreconcilable conflict with federal law. In conflict preemption, the test is whether state law "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Hines v. Davidowitz,* 312 U.S. 52, 57 (1941). "The crucial inquiry is not whether state law reaches matters also subject to federal regulation, but whether the two laws function harmoniously rather than discordantly." *Holliday v. Bell Helicopters Textron, Inc.,* 747 F. Supp. 1396, 1401 (D. Haw. 1990) (quoting *Morseburg v. Baylon,* 621 F2d 972, 978 (9th Cir.), *cert denied,* 449 U.S. 993 (1980)).

In *Cleveland v. Piper Aircraft Corp., supra,* Piper Aircraft Corporation contended, among other things, that the plaintiff's state law tort claims were impliedly preempted because the federal regulatory framework actually conflicts with state common law duties. *Cleveland, supra,* 985 F.2d at 1445. The *Cleveland* court rejected outright the contention that Congress

intended the regulation of air commerce to be a purely federal function. The court concluded instead that Congress intended to allow state common law to stand side by side with the system of federal regulations it has developed." 985 F.2d at 1445.

The court of appeals' decision is at odds with the Tenth Circuit's decision in *Cleveland* and the Eleventh Circuit's decision in *Public Health Trust*, the two most recent and noteworthy appellate decisions on preemption in the aviation context. The Federal Aviation Regulations – whether dealing with the certification of aircraft as in *Cleveland and Public Health Trust* or dealing with the issuance of airworthiness directives as in this case – are minimum standards only and are "not intended to be the last word on safety." *Cleveland*, 985 F.2d at 1446.

The decision of the Third Circuit, in conflict with the decisions of the Court and other circuits, should be set aside and reversed.

III. THE COURT'S GUIDANCE IS NEEDED TO PASS UPON QUESTIONS OF FIRST IMPRESSION CONCERNING THE APPLICABILITY OF NOERR-PENNINGTON PRINCIPLES OUTSIDE THE CONTEXT OF ANTITRUST LITIGATION.

The court of appeals, in affirming the grant of summary judgment as to the civil conspiracy, concerted action, and tortious interference with contract claims concluded that "the district court correctly determined that Beech has a First Amendment right to induce lawful government action. *See, e.g., Omni Resource Dev. Corp. v. Conoco, Inc.*, 739 F.2d 1412, 1413 (9th Cir. 1984)." (App. A-3). *Omni Resource*, however, was a decision involving application of the *Noerr-Pennington* doctrine in the antitrust context.

Under *Noerr-Pennington*, a party may not be held liable under the antitrust laws for seeking to persuade government officials to take particular action, even where the sole aim is to promote its competitive position in the market place to the detriment of a competitor. This doctrine is in part a constitutionally-based doctrine limiting the application of the

Sherman Act. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38 (1961). In *Noerr, supra,* the Court first focused on the tension between the first amendment and the Sherman Act, holding that Congress had not intended the Sherman Act to apply to "activities compris-[ing] mere solicitation of governmental action with respect to this passage and enforcement of law." *Id.* at 138. The Court nevertheless cautioned:

> There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act will be justified.

Id. at 144.[4]

In *California Transport Co. v. Trucking Unlimited,* 404 U.S. 508 (1972) the court applied *Noerr* to administrative and adjudicative proceedings, and was the first time this Court applied the sham exception referred to in *Noerr.* The *California Motor Court* confirmed that the *Noerr-Pennington* doctrine rested squarely upon the first amendment rights of petition and association and held that a group of trucking companies' opposition to each and every licensed application made by their competitors "with or without probable cause, and regardless of the merits of the cases," did not deserve *Noerr-Pennington* immunity. 404 U.S. at 510-12.

This Court has never expressly decided the question whether the *Noerr-Pennington* doctrine extends outside the boundaries of the antitrust laws. *Hufsmith v. Weaver*, 817 F.2d 455, 458 (8th Cir. 1987). Some courts have expressly held that

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4. Subsequently, in *United Mine Workers of America v. Pennington,* 381 U.S. 657, 670 (1965), the Court held that *Noerr* protected the efforts of large mine owners and union officials to squeeze out smaller coal producers by persuading the Secretary of Labor to raise minimum wage levels:

> Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act.

the doctrine does apply outside the antitrust area whereas others have cited its reasoning in cases other than antitrust cases without reaching this conclusion. *Compare Hufsmith,* 817 F.2d at 458 *with Brownsville Golden Age Nursing Home v. Wells,* 839 F.2d 155, 160 (3d Cir. 1988). This Court as well has looked to the *Noerr* doctrine at least once in a non-antitrust context, though without expressly deciding its applicability in cases other than those under the federal antitrust statutes. *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 913-14 (1982).

If *Noerr-Pennington* protections are in fact applicable in non-antitrust cases, the Court should grant certiorari to affirmatively answer this question of first impression and to address the showing sufficient to defeat summary judgment by virtue of the doctrine and to show that the conduct at issue is unprotected activity under the first amendment. Indeed, both the district court and the court of appeals appear to have adopted a per se rule; that is, simply because Beech contacted the FAA in order to have governmental action taken, all of its actions were protected constitutional activity. The Court has rejected the view "that the *Noerr* doctrine immunizes every concerted effort that is genuinely intended to influence governmental action." *Allied Tube & Conduit Corp. v. Indian Head, Inc.,* 486 U.S. 492, 503 (1988).

Macario presented evidence from which the jury could infer that it was the use of the process itself, rather than the outcome, which was the liability-producing conduct. *City of Columbia v. Omni International Advertising, Inc.,* 111 S. Ct. 1344, 1354 (1991). Indeed, Macario established that not only was the information provided to the FAA false, but that in an unprecedented fashion the FAA ignored all but one (Beech's) of the twenty-three comments against the regulation. *See* 57 Fed. Reg. 31654 (July 17, 1992). Everyone who did not have a litigation interest, including the National Transportation Safety Board, argued against the issuance of the AD. Macario produced evidence from which the jury could find that the entire regulatory process, from start to finish, was orchestrated by litigation counsel for the respondents and their product liability lawyers.

In the face of such evidence of the petitioning activity being a litigation ploy to defeat the *Sunbird* lawsuit and notwithstanding the revelation that PWC was simultaneously recommending the filter on the same engines on other aircraft, the court below refused to recognize Macario's right to prove the sham exception to the jury. This result cries out for review by the Court.

CONCLUSION

The decisions by both of the courts below are totally at odds with the precedents of the Court. The court of appeals totally failed to perform an independent, *de novo* review of the facts in affirming the summary judgment entered by the trial judge, totally misapplied the law of federal preemption by refusing to allow state-based damage claims to proceed in the face of a federal "minimum standard" air safety regulation, and denied Macario, in the face of uncontroverted evidence, the opportunity to prove a sham exception to the *Noerr-Pennington* doctrine even if it applied out of the antitrust context.

In sum, the court below tossed aside the state-based breach of contract claims even though the federal agency at issue did not prohibit compliance with the contract. The questions presented to this Court are of critical importance because clearly there is an absence of clarity in the Court's standards to be applied in the appellate review of summary judgment, the application of *Noerr-Pennington* doctrine to non-antitrust cases, and whether federal preemption precludes state-based damage claims where the conduct of a federal agency does not prohibit performance.

For all the foregoing reasons, therefore, certiorari should be granted.

Respectfully submitted,

ARTHUR ALAN WOLK*
CATHERINE B. SLAVIN
WOLK & GENTER
1710-12 Locust Street
Philadelphia, PA 19103
(215) 545-4220

Counsel for Petitioner

*Counsel of Record

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-1567

T. MICHAEL MACARIO, III, Administrator
of the Estate of Matthew Macario, Deceased,
Appellant

v.

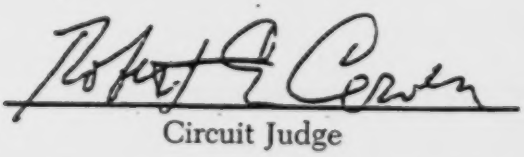
PRATT & WHITNEY CANADA, INC., A
Subsidiary of United Technologies Corporation;
BEECH AIRCRAFT CORPORATION

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, *Chief Judge;* BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, and LEWIS, *Circuit Judges*

The petition for rehearing filed by appellant having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,



Circuit Judge

Dated: FEB 25 1994

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 93-1567

T. MICHAEL MACARIO, III,
ADMINISTRATOR OF THE ESTATE OF
MATTHEW MACARIO, DECEASED

Appellant,

v.

PRATT & WHITNEY CANADA, INC.,
A SUBSIDIARY OF UNITED TECHNOLOGIES
CORPORATION and BEECH AIRCRAFT CORPORATION

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 90-03906)
District Judge: Hon. James McGirr Kelly

Submitted Under Third Circuit LAR 34.1(a)
January 11, 1994

Before: STAPLETON, COWEN and ALITO
Circuit Judges

(Filed JAN 28 1994)

MEMORANDUM OPINION OF THE COURT

COWEN, *Circuit Judge.*

T. Michael Macario appeals the order of the district court granting summary judgment in favor of Pratt & Whitney Canada (Pratt) and Beech Aircraft Corporation (Beech). The facts of this

case are adequately set forth in the district court's opinion dated February 11, 1993.

The district court properly granted summary judgment in favor of Pratt as to the counts for breach of contract, misappropriation, civil conspiracy, concerted action, unjust enrichment and fraud in the inducement, and properly granted summary judgment in favor of Beech as to the counts for tortious interference with contract, misappropriation, civil conspiracy, concerted action, unjust enrichment, and fraud in the inducement.

As to the breach of contract claim, the district court correctly determined that the FAA issued an Airworthiness Directive on July 16, 1992, which made it impracticable for Pratt to conform with the precise terms of the settlement agreement it entered into with Macario. To the extent possible, Pratt conformed with the settlement agreement and therefore did not breach its contractual obligations. *See, e.g., Lichtenfels v. Bridgeview Coal Co.*, 531 A. 2d 22, 25-26 (Pa. Super. Ct. 1987).

As to the claim for tortious interference with contract, the district court correctly determined that Beech has a First Amendment right to induce lawful government action. *See, e.g., Omni Resource Dev. Corp. v. Conoco, Inc.*, 739 F.2d 1412, 1413 (9th Cir. 1984).

The district court properly granted summary judgment in favor of Pratt and Beech on Macario's misappropriation count. Since the FAA's action prevented Pratt from issuing the service bulletin in strict conformance with the settlement agreement, it cannot be argued that Macario had a property interest in the service bulletin.

With regard to the claims for civil conspiracy and the tort of concerted action, the district court properly determined that insufficient evidence exists in the record to establish a genuine issue of material fact concerning wrongful activity on the part of Pratt or Beech. Moreover, as noted above, Beech's actions in seeking FAA determinations is protected activity under the First Amendment, and therefore such activity cannot form the basis of a civil conspiracy or tort of concerted action claim.

As to the claim for unjust enrichment, this claim has no merit, for under Pennsylvania law, "the quasi-contractual doctrine of unjust enrichment is inapplicable when the relationship between the parties is founded on a written agreement or express contract." *Hershey Foods v. Ralph Chapek, Inc.*, 828 F.2d 989, 999 (3d Cir. 1987).

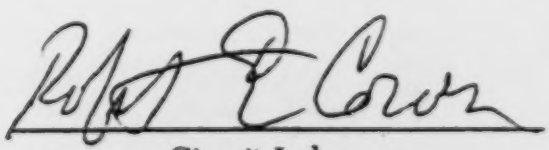
The claim for fraud in the inducement of the Settlement Agreement was properly disposed of by summary judgment. Macario has failed to adequately demonstrate any measurable damages that would have resulted, even assuming that fraud could be proved. Because no genuine issue of material fact exists as to the question of damages, the district court properly granted summary judgment in favor of Pratt and Beech. *See Kaufman v. Mellon Nat'l Bank and Trust Co.*, 366 F.2d 326, 331 (3d Cir. 1966).

It is unclear whether Macario properly raised the question of whether the district court erred in denying Macario's Motion for Reconsideration, since it is an argument Macario raised for the first time in this court only in its Reply Brief. In any event, the district court did not err in denying the Motion for Reconsideration, since Service Bulletin 1448 is not newly discovered evidence.

We have carefully considered all of the issues and arguments raised by Macario, and we find that the district court's judgment is correct in all respects. The orders of the district court dated February 11, 1993 (filed February 12, 1993) and May 10, 1993 (filed May 11, 1993), will be affirmed.

TO THE CLERK:

Please file the foregoing opinion.



Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

T. MICHAEL MACARIO, III, ADMINISTRATOR of the Estate of Matthew Macario, Deceased, *Plaintiff,*	:	CIVIL ACTION
v.	:	
PRATT & WHITNEY CANADA, INC. and BEECH AIRCRAFT CORP., *Defendants.*	:	NO. 90-3906

MEMORANDUM

J. M. KELLY, *J.* February 11th, 1993

Presently before the court is Defendant Pratt & Whitney Canada's ("Pratt") motion for summary judgment on Counts I, III, IV, V, VI, VII of Plaintiff's Second Amended Complaint. Also before the court is Defendant Beech Aircraft Corporation's ("Beech") motion for summary judgment against Plaintiff Macario. This court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332.

Plaintiff Macario is the Administrator of the Estate of Matthew Macario, deceased. On February 1, 1985, in Cedarville, New Jersey, Matthew Macario was killed in a crash of a Beechcraft King Air. Defendant Pratt manufactures the aircraft powerplant engine known as the PT-6. Defendant Beech is a manufacturer of airplanes and airplane parts.

Macario filed a lawsuit against Pratt, Beech and others entitled *T. Michael Macario, Administrator of the Estate of Matthew Macario v. United Technologies Corp., et. al.*, Civil Action No. 86-4951 (E.D. Pa. filed Aug. 21, 1986) ("Macario I"). Prior to the trial Macario and Beech settled. Before the jury deliberations had been completed in *Macario I*, Plaintiff and

Pratt reached a settlement agreement. One term of the settlement agreement required Pratt to pay Plaintiff six million dollars. The other term demanded Pratt to issue a service bulletin "as soon as practical" about the installation of P-3 filters.

Prior to the issuance of the Service Bulletin, certain safety issues had been raised concerning the installation of the P-3 filter. As a result, the Federal Aviation Administration ("FAA") and the Department of Transport Canada ("DOT") requested Pratt to delay the issuance of the Service Bulletin. Pratt complied with this request.

In connection with the issuance of the Service Bulletin, Pratt and Beech conducted flight tests and reported their findings to the FAA.

In June of 1990, before the tests were completed, Plaintiff brought this action. Plaintiff filed this Second Amended Complaint on March 5, 1991. The court issued a stay pending the conclusion of the FAA tests.

Finally, on July 17, 1992, after numerous tests on the P-3 filter, the FAA issued an Airworthiness Directive ("AD"). The AD directed P-3 filters to be removed.

In the instant complaint, Plaintiff claims that Pratt has breached the settlement agreement by failing to issue, immediately, the required Service Bulletin. Plaintiff claims that Beech "tortiously, wantonly and with reckless indifference to the safety of others" influenced Pratt in the non-issuance of the Service Bulletin. Plaintiff alleges that as a result of the delay, they are entitled to an additional three (3) million dollars. It is further alleged that they are entitled to damages from Beech for interference with contractual relations between Plaintiff and Defendant Pratt.

Under Fed. R. Civ. P. 56(c), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." This Court is required, in resolving a motion for summary judgment pursuant to Rule 56, to determine whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby,*

Inc., 477 U.S. 242, 248 (1986). In making this determination, the evidence of the nonmoving party is to be believed, and the district court must draw all reasonable inferences in the nonmovant's favor. *See id.* at 255.

While the movant bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact, Rule 56(c) requires the entry of summary judgment "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Therefore, the party opposing the motion must come forward with "more than a mere scintilla of evidence in its favor" and " 'cannot simply reassert factually unsupported allegations contained in its pleading.' " *Williams v. Borough of West Chester*, 891 F.2d 458, 460 (3d Cir. 1989) (citing *Anderson*, 477 U.S. at 249 and 325).

DISCUSSION

I. Count I

In Count I of the Second Amended Complaint, Plaintiff alleges that Pratt has breached the settlement agreement. As a result of the delay in the issuance of the Service Bulletin, Plaintiff claims entitlement to three (3) million dollars in damages.[1]

Pratt moves for Summary Judgment on this Count. In support, Pratt claims that they are in full compliance with the terms of the settlement agreement. Pratt alleges that the words of the settlement agreement required them to issue the service bulletin "as soon as practical". The FAA has concluded that P-3 filters can be installed in aircrafts certified at higher idle speeds. However, the P-3 filters create unsafe conditions in low idle

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1. This figure was calculated by subtracting the original amount asked for in the settlement negotiations, nine (9) million dollars, and the final amount settled for, six (6) million dollars.

setting aircrafts. (*See* Defendant Pratt's Supplemental Mot. for Summ. J., Exhibit C.) Pratt issued Service Bulletin 1330 in accordance with these findings. Pratt claims that they have complied with the settlement agreement to the best of their ability under the circumstances. Pratt asserts that the issuance of the Service Bulletin, with the wording originally requested, would recommend actions creating unsafe conditions, thereby violating public policy.

Lastly, Pratt alleges that the terms of the agreement were premised on a mutual mistake of fact. Neither party was aware that the FAA and Transport Canada would have safety concerns about the installation of P-3 filters.

In response, Plaintiff claims that on April 29, 1991 Pratt issued a revised service bulletin. This bulletin only applied to the Beech King Air A100 model aircraft and not the thousands of other aircrafts that it was originally intended to effect. Plaintiff claims that Pratt's lack of action did not satisfy the terms in the service agreement "as soon as practical".

Plaintiff insists that the impracticality argument fails in that the FAA has done nothing to prevent Pratt from issuing the bulletin. Plaintiff claims that Pratt has failed to define a test program identifying an engine configuration which would allow the P-3 filter. Plaintiff also declares that the Airworthiness Directive allows for alternate means of compliance, however Pratt has completely failed to take such steps.

After taking into consideration the numerous pleadings, supplemental submissions and hearing extensive oral argument, it appears that no triable issues of fact exist as to the breach of contract count. The issue raised is whether or not the terms of settlement agreement can prevail over the FAA.

On July 16, 1992, the FAA issued an Airworthiness Directive requiring the removal of the P-3 filter from Pratt PT6A series turboprop engines. (*See* 14 CFR Part 39, Pratt Supp. Mem. in Support Summ. J., Exhibit C.). Henceforth, Pratt issued the Service Bulletin in conformity with the terms of the Airworthiness Directive.

While the court is proficient in many areas, it preserves matters of safety in aviation to the expertise of the FAA. The

parties as well as the court's are dependant upon the authorizations submitted by the FAA in areas of aviation. Where the FAA has issued an Airworthiness Directive on a matter, it is the responsibility of this court and any agreement governed by this court to comply with such pronouncements. *See Philadelphia Federation, ETC.. v. Thomas,* 436 A.2d 1228 (1981) (where a contract is subject to a condition precedent within the control of an independent legislative body and such condition does not occur, the duties are discharged to extent of dependance upon the conditions occurrence.) The two parties negotiated under a mistake of fact. *Id.* Both mistakenly assumed that the Service Bulletin could be issued. However the FAA issued the AD contradicting the proposed Service Bulletin. Under these circumstance Pratt could only issue a limited Service Bulletin. Pratt has issued a Service Bulletin in accord with the AD. Pratt has complied to the best of their ability. Pratt's duties as far as issuing the exact Service Bulletin requested are discharged.

This court finds that under the circumstances Pratt has complied with the terms of the settlement agreement. Thus, Pratt has not breached the Settlement Agreement. Accordingly, Pratt's Motion for Summary Judgment on Count I shall be granted.

The court finds Plaintiff's request for damages to be unsupported. Plaintiff contends that the nine (9) million dollars originally asked for was eventually reduced to six (6) million dollars as a result of the agreement to issue Service Bulletin 1330. Therefore, Plaintiff insists that damages in the amount of three (3) million dollars are owed.

The court disagrees with Plaintiff's demand. Firstly, Plaintiff's estimation is arbitrary. Often during negotiations parties demand a higher dollar amount than the party is willing to settle for. This is what is commonly known as negotiating techniques. It is the courts understanding that the three (3) million dollar difference was a consequence of negotiations.

Secondly, the court finds Pratt to be in compliance with the Settlement Agreement. In situations such as this, where an independent party is responsible for the lack of complete compliance, the parties remain free from bearing complete responsibility or fault. *Philadelphia Federation, ETC. v.*

Thomas, at 1235. Neither blame nor responsibility can be placed on either party. *Id.* Therefore the terms of the agreement that can be complied with shall be enforced and the Service Bulletin shall be issued so as to enforce the FAA's Airworthiness Directive. Since Pratt is not in breach of the settlement agreement as it stands after the issuance of the Airworthiness Directive, Plaintiff is not entitled to damages.

II. COUNT II

In Count II Plaintiff alleges that Beech, with the sole intention of benefitting their position in the *Sunbird* litigation, interfered with the contractual relationship between Pratt and Plaintiff.

Beech moves for summary judgment on this claim alleging that they have done nothing more than exercise their constitutional right to petition the government. Consequently, no claims can be brought against them. Beech alleges that Plaintiff exercised their right as well, but failed to convince the FAA to conform to their position. Beech alleges that the actionable conduct was nothing more than Beech attempting to demonstrate to Pratt and the FAA that a safety flight hazard existed where P-3 filters were installed in Beech King Airs.

Beech asserts that they were not consulted by Pratt prior to the settlement agreement in *Macario I.* After becoming aware of the terms of the settlement agreement, Beech's Manager of Commercial products, Mr. Jacobson, advised Pratt that in 1981 Beech's engineering department had discovered that engines equipped with P-3 filters did not respond "satisfactorily to commands for acceleration." Jacobson advised Pratt that the service bulletin was unacceptable to Beech.

Beech met with the FAA and advised them of their concerns. Subsequently, the FAA decided to pursue appropriate engine ground and flight tests. The FAA notified the DOT of the potential dangers. Consequently, the DOT notified Pratt of the dangers and of the FAA's request to delay the service bulletin. Beech claims that the delay was the result of orders from governmental agencies and not the result of threats.

Beech alleges that before completion of the tests, the FAA's New England office notified DOT that no engine acceleration problems had been discovered. As a result of this false premise, the FAA gave permission to Pratt to release the bulletin at their discretion. Beech, unaware of this development, continued with their tests. The flight tests established a non-acceptable increase in acceleration with P-3 filters installed.

Tests and discussions continued until the FAA issued a final rule. The FAA required the inspection for and removal of P-3 filters from certain model PT6A engines. (*See* 14 CFR Part 39, Pratt Supp. Mem. in Support Summ. J., Exhibit C.).

Beech asserts that the First Amendment guarantees a right to petition the government. Beech insists that its actions are supported under the *Noerr-Pennington* doctrine. The *Noerr-Pennington* doctrine states that actions taken to induce lawful government action are immune from anti trust liability. *Omni Resource Dev. Corp. v. Conoco, Inc.* 739 F.2d 1412, 1413 (9th Cir. 1984); *see also LeBlanc-Sternberg v. Fletcher,* 781 F.Supp. 261, 265 (S.D.N.Y. 1991). This immunity arises from the First Amendment's "guarantee of the right to petition the government for redress of grievances." *Lansdale v. Philadelphia Electric Co.,* 517 F.Supp, 218, 220 (E.D.Pa. 1981).

There is an exception to the *Noerr-Pennington* doctrine. The sham exception excludes from immunity those proceedings lacking in probable cause which are mere attempts to interfere with the business relationship of a competitor. *Barq's, Inc. v. Barq's Beverages, Inc.,* 677 F.Supp. 449, 451 (E.D.La. 1987). The sham exception is only for those who seek access for the sole purpose of harassment or to obstruct others from seeking relief.

The doctrine was established as a defense to antitrust claims. Beech argues that the *Noerr-Pennington* doctrine has been extended beyond antitrust issues. Beech claims that *Brownsville Golden Age Nursing Home, Inc. v. Wells,* 839 F.2d 155, 160 (3d Cir. 1988) applied the *Noerr-Pennington* doctrine in an action based in tort liability. Brownsville nursing home brought the action alleging civil conspiracy and tortious interference with business relations. The *Brownsville* Court applied the rule that "liability cannot be imposed for damage caused by inducing legislative, administrative, or judicial action...." *Id.*

The Court held that actions raising the concern and attention of state and federal authorities cannot be the basis for tort liability. *Id.*

Upon consideration of extensive pleadings and having heard oral argument, it appears that Beech's actions fit within the *Noerr-Pennington* doctrine. Thus are protected and cannot be the basis for tort liability. Accordingly, Beech's Motion for Summary Judgment on Count II shall be granted.

III. Count III

Count III states a claim for misappropriation of Plaintiff's property right. Plaintiff contends that a property right exists in the Service Bulletin.

Defendant Pratt moves for summary judgment on Plaintiff's misappropriation count alleging that Plaintiff has failed to plead properly the elements of misappropriation. Pratt claims that Plaintiff has not demonstrated that a property right existed in the Service Bulletin. It is further alleged that Plaintiff has failed to show actual conversion of the property for personal use.

In response, Plaintiff declares that the Service Bulletin was bargained for consideration in the Settlement Agreement. By reaching an accord in the Settlement Agreement, Plaintiff gave up his right in the underlying civil litigation.

Pennsylvania law does not clearly spell out the requirements for misappropriation of property rights. However from the various other misappropriation cases, this court deduces that misappropriation occurs when a property right belonging to one person is used to the benefit another. *See Macbeth-Evans Glass Co. v. Schnelbach, et al.*, 239 Pa 76, 86 A. 688 (1913), *see also Miracle Industries, Inc. v. Getty Petroleum Corp.*, No. CIV A. 90-4238, 1992 WL 121723 (E. D. Pa. May 20, 1992) .

The critical question in this issue is whether the issuance of the service bulletin can be construed as a property right belonging to Macario?

The term property has been defined by courts on a case by case basis. In *Stafford, et al. v. United States*, 435 F.2d 1036 (M.D. Ga 1977), the Court stated that "[P]roperty can be real, personal, tangible or intangible, and a person has a property

right in something if he has the right to possess it, use it and dispose of it." *Id* at 1038. In this case Macario possessed a commitment from Pratt for the issuance of the Service Bulletin pertaining to P-3 filters "as soon as practical". However, the issuance of the Service Bulletin was in the ultimate control of the FAA. As previously stated, the FAA has ruled that the Service Bulletin could not be issued.

The Plaintiff cannot claim that he has been deprived of a property right without first establishing that he has a right to that property. It has already been established that it is the FAA which makes final determinations as to the issuance of service bulletins. Neither this court nor the parties to the contract can stand in the shoes of the FAA. The FAA has made a ruling on the issuance of the Service Bulletin. Plaintiff does not possess a right in the issuance of the Service Bulletin. A right to the bulletin could only be establish upon the approval by the FAA. Because Plaintiff has no property right in the Service Bulletin, its misappropriation claim must fail. Summary judgment in Count III shall be granted in favor of Defendants Pratt and Beech.

IV. Counts IV & V

Defendants Pratt and Beech move for Summary Judgment on Counts IV & V, civil conspiracy and tort of concerted action. Plaintiff contests that Pratt and Beech entered into a joint defense agreement in *Macario I* and *Sunbird.* Plaintiff also alleges that Beech's counsel assisted Pratt's counsel during the *Macario I* trial. Pratt allege that the communications are protected by the First Amendment and preempted by federal law, regulation and policy.

Beech moves for summary judgment on the civil conspiracy count alleging that they had no prior knowledge of the settlement between Pratt and Macario. Beech asserts that its actions were justified since the FAA has proposed action upholding their position that the installation of the filters is a safety hazard. In further support, Beech declares that Plaintiff has failed to produce any evidence of threats or coercion tactics in attempt to influence Pratt to take action favorable to Beech.

Plaintiff failed to establish in both its briefs and oral argument specific facts detailing the conspiracy between Pratt and Beech that allegedly existed prior to the settlement agreement. During oral argument, the court requested Macario to submit evidence of the contents of a telephone conversation, or conversations establishing the existence of a conspiracy between the parties. Instead, Plaintiff attempted to establish the conspiracy from circumstantial evidence.

Due to the lack of specific facts as to the existence of a conspiracy, the court finds that a conspiracy did not exist. Accordingly, Defendants Motion for Summary Judgment on Counts IV & V shall be granted.

V. Count VI

Count VI of the Second Amended Complaint alleges that Defendants have been unjustly enriched by avoiding the jury verdict and the subsequent estoppel effect the verdict would have had on the *Sunbird* litigation. Plaintiff proclaims entitlement to the amount by which the defendants have been unjustly enriched.

Pratt claims that under Pennsylvania law unjust enrichment is a quasi-contractual remedy. The doctrine of unjust enrichment is inapplicable where a written or express contract exists between the parties. Pratt allege that any obligations owed by them to the Plaintiff exist as the result of the settlement agreement.

Plaintiff admits that unjust enrichment is usually unavailable where a written or express agreement exists between the parties. However, Plaintiff contests that where a contract is found to be unenforceable, unjust enrichment is an available remedy.

Under Pennsylvania law, "the quasi-contractual doctrine of unjust enrichment is inapplicable when the relationship between the parties is founded on a written agreement or express contract." *Hershey Foods Corp. v. Ralph Chapek, Inc.*, 828 F.2d 989, 999 (3d Cir. 1987); *quoting Benefit Trust Life Ins. Co. v. Union Nat. Bank*, 776 F.2d 1174 (3d Cir. 1985). Where an express contract exists between the parties, a party's recovery is

limited to the terms of the agreement. *Id.* In certain circumstances where a contract is found to be unenforceable, a party may succeed on a claim of unjust enrichment. *Shulman v. Continental Bank,* 513 F.Supp. 979, 986 (E.D.Pa. 1981). To recover under a theory of unjust enrichment, it is necessary to demonstrate that defendant was unjustly enriched at plaintiff's expense, and that the situation exists so as to require the recipient of the benefit to make restitution. *Sachs v. Continental Oil Co.,* 454 F.Supp. 614, 619 (E.D.Pa. 1978). Defendant must also be on notice that the party performing the service expected to be paid. *Id* at 20.

Plaintiff admits to a contractual relationship with Pratt defined by the provisions of the settlement agreement. However, Plaintiff contends that the settlement agreement is unenforceable entitling Plaintiff to restitution. *See Shulman v. Continental Bank,* supra at 986; *see also, Sachs v. Continental Oil Co.,* supra at 619.

This court finds no basis for recovery pursuant to the quasi-contractual theory of unjust enrichment. The facts in this case establish that a valid contract existed between the parties. The reality that a term of the contract could not be performed does not render the contract unenforceable. The Settlement Agreement exists and is enforceable to the extent the FAA's Airworthiness Directive permits. Therefore the quasi-contractual theory of unjust enrichment is inapplicable. The court shall grant summary judgment on Count VI in favor of Defendants Pratt and Beech.

VII. Count VII

Count VII alleges that Defendants have committed fraud in the inducement of the Settlement Agreement. Pratt assert that Plaintiff cannot support this claim through law or fact. Pratt declare that since the settlement agreement has not been breached, no claim of fraud in the inducement can be maintained. In addition, Pratt notes that Plaintiff has failed to plead fraud by "clear, precise, and convincing evidence". Furthermore, Pratt asserts that no monetary damages can be set forth as a resalt of the delay or non-issuance of the service bulletin.

Hence, Plaintiff has no compensatory damages, imagined benefits are not legally permissible.

Finally, Pratt in their reply memorandum profess that Plaintiff is prohibited from recovery in so forth that Pennsylvania law requires the return of proceeds of a settlement prior to proceeding on an action for fraud in the inducement of that settlement. In support, Pratt cites the recent decision in *Dempsey v. Associated Aviation Underwriters,* 141 F.R.D. 248 (E.D.Pa. 1992), *aff'd,* 977 F.2d 567 (3d Cir. Sept 30, 1992), in which the Court granted defendant Cessna's motion to dismiss the fraud in the inducement claim on the grounds that Plaintiff had failed to return the settlement proceeds. Under the rule a party has two choices upon discovering fraud in the execution of a release, either return the consideration and disaffirm the release or affirm the agreement and ignore the fraud. *Id.: see Nocito v. Lanuitti,* 402 Pa. 288, 167 A.2d 262 (1961).

Plaintiff has failed to return the proceeds from the settlement, therefore an action in fraud may not be instituted. However, Plaintiff denies that they must return the proceeds of the settlement agreement before maintaining an action in fraud. Plaintiff draws the courts attention to a more recent decisions in the Pennsylvania Superior Court, *Briggs v. Erie Insurance Group,* 406 Pa. Super. 560, 594 A.2d 761 (1991). Plaintiff declares that this court should be applying the holding set forth by the *Briggs* Court. The *Briggs* court held that Plaintiff's were not required to return the proceeds of the settlement agreement because Plaintiff's were not seeking rescission of the settlement agreement, but were asserting damage claims based on the insurers fraud during the settlement proceedings. *Id* 594 A.2d at 763.

Under *Erie Railroad Co. v. Tompkins,* this court is bound to apply the law as interpreted by the Pennsylvania Supreme Court. The holdings of an intermediate appellate court do not override authority set out by the Supreme Court of Pennsylvania. *Dempsey,* supra, at 250. Pennsylvania encourages the enforcement of civil settlements. *Dempsey* at 249. There is no indication that the policy favoring settlements has been set aside by the Pennsylvania Supreme Court. *Id.*

The leading authority in this matter was set out by the Court in *Nocito v. Lanuitti,* supra. The *Nocito* Court held that "a party who executes a release allegedly procured by fraud, may, upon discovering the fraud, either disaffirm the release and return the consideration, or affirm the voidable contract and waive the fraud." *Dempsey,* at 249; *Nocito v. Lanuitti,* 402 Pa. at 289, 167 A.2d at 262.

Plaintiff declares that the holdings set forth in *Nocito* and followed by *Dempsey* are inapplicable in the present situation. Plaintiff suggests that the under these holdings a party to a settlement agreement is simply precluded from suing for a greater amount than originally issued under the terms of the agreement, Plaintiff claims that where a party had no intent of complying with the settlement agreement, the contract does not have to be rescinded prior to entertaining a suit for fraud. Plaintiff states that the party may either disaffirm the agreement in a suit for recision or affirm the agreement and bring a suit for damages. *See Associated Hardware Supply Co. v. Big Wheel Distributing Company,* 355 F.2d 114 (3d Cir. 1966).

This court will uphold the law set forth by the *Nocito* court. Plaintiff has not returned the proceeds from the Settlement Aqreement, therefore an action in fraud in the inducement may not be asserted. Pratt's Motion for Summary, Judgment on Count VII shall be granted.

As far as the action maintained against Beech for fraud in the inducement, Plaintiff has failed to delineate, in the numerous pleadings and oral argument, any specific evidence of Beech's influence over Pratt in negotiating the terms of the Settlement Agreement. Accordingly, the court shall grant Beech's motion for summary judgment on the fraud in the inducement claim. Summary Judgment shall be granted in favor of Defendants on Count VII.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

T. MICHAEL MACARIO, III, *ADMINISTRATOR* of the Estate of Matthew Macario, Deceased, *Plaintiff,*	:	CIVIL ACTION
v.	:	
PRATT & WHITNEY CANADA, INC. and BEECH AIRCRAFT CORP., *Defendants.*	:	NO. 90-3906

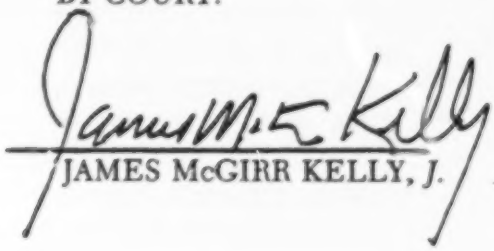
ORDER

AND NOW, this 11th day of February, 1993, in consideration of Defendant Pratt & Whitney, Canada's Motion for Summary Judgment; Defendant Beech's Motion for Summary Judgment; Beech's Supplemental Memorandum in Support of the Motion for Summary Judgment; Beech's Reply thereto; Pratt & Whitney's Supplemental Memorandum; Pratt & Whitney's Reply Memorandum in Further Support; Plaintiff's Memorandum in Opposition to Defendant's Motions; Oral Argument; Beech's Rebuttal Argument; Pratt's Rebuttal Argument; Plaintiff's Supplemental Memorandum in Opposition; and the foregoing Memorandum of Law; it is hereby ORDERED that:

(1) Summary Judgment is GRANTED in favor of Defendant Pratt & Whitney Canada, Inc. and against Plaintiff T. Michael Macario, III, Administrator of the Estate of Matthew Macario, deceased.

(2) Summary Judgment is GRANTED in favor of Defendant Beech Aircraft Corporation and against Plaintiff T. Michael Macario, III, Administrator of the Estate of Matthew Macario, deceased.

BY COURT:



JAMES McGIRR KELLY, J.

ENTERED: 2/12/93
CLERK OF COURT

STATUTES AND RULES INVOLVED

Section 1305 of the Transportation Code provides, in pertinent part:

> (a) Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof and no interstate agency or other political agency of two or more having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation. . . .

49 U.S.C. App. § 1305(a).

Section 1506 of the Transportation Code provides:

> Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

49 U.S.C. § 1506.

Rule 56 of the Federal Rules of Civil Procedure, as it existed at the time summary judgment was granted in this case, provides, in relevant part:

> (c) **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.
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> . . . .
>
> (e) **Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be

made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Fed. R. Civ. P. 56(c),(e).